Supreme Court, U.S.
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No. _____

IN THE SUPREME COURT
OF THE UNITED STATES
October Term, 2001

STEVEN McCOY,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari
to the United States Court of Appeals
For The Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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6288

QUESTION PRESENTED

The question involves the 8th Circuit Court of Appeals' failure to recognize that Appellant's administrative claim properly gave notice of the continuing negligence theory which was to be employed in the Petitioner's cause of action filed with the Federal Bureau of Prisons. The Eighth Circuit Court of Appeals' determination that medical malpractice that was associated with the amputation of the Petitioner's leg initiated the two year statute of limitation under 28 U.S.C. §2401(b) (Federal Tort Claims Act) and that the statutes of limitation was not tolled by the continuing treatment doctrine was not correct in that the statute of limitation should have been tolled by the continuing treatment doctrine while there is ongoing treatment of a patient. This determination that the statute was not tolled by the Eighth Circuit Court of Appeals is in conflict with, most notably, the Second and Fourth Circuit Courts of Appeal who have held that the statutes of limitation under 28 U.S.C. §2401(b) was tolled while there is continuing medical treatment of the patient.

LIST OF PARTIES

The Plaintiffs/Appellants in the proceeding below were the Plaintiff, Steven McCoy, a person who was incarcerated in a federal medical facility in Springfield, Missouri. The United States was is the Defendant/Appellee below and the Respondent herein. The attorney for the United States is Earl W. Brown, III, Assistant United States Attorney, 901 St. Louis Street, Suite 500, Springfield, Missouri 65806.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

LIST OF PARTIES ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF CASE 3

CONCLUSION 20

TABLE OF AUTHORITIES

Ashley v. United States, 413 F.2d 490 (9th Cir. 1969) 8

Brown v. United States, 353 F.2d 578 (9th Cir. 1965) 17

Dundon v. United States, 559 F.Supp. 469 (E.D. N.Y. 1983) . 11

Otto v. Nat'l Inst. of Health, 815 F.2d 985 (4th Cir. 1987) .....

..... . 7, 8, 9, 17, 18, 21

Phillips v. Carroll, 379 S.W.2d 143 (Mo. App. E.D. 1964) ... 12

Reilly v. United States, 513 F.2d 147 (8th Cir. 1975) 12, 14, 15, 16

Tyminski v. United States, 481 F.2d 257 (3rd Cir. 1973) ... 15, 16

United States v. Kubrick, 444 U.S. 111 (1979) 4, 12, 14

Wehrman v. United States, 830 F.2d 1480 (8th Cir. 1987) .. 7, 16

Statutes:

28 U.S.C. §1254(1) 3

28 U.S.C. §1331 2

28 U.S.C. §2401(b) 2, 3, 4, 7

28 U.S.C. §2675(a) 3

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioner, Steven McCoy, Plaintiff below, respectfully prays that the Court issue a Writ of Certiorari to review the opinion of the Eighth Circuit Court of Appeals in *Steven McCoy v. United States of America*, No. 00-1375.

OPINIONS BELOW

The opinion of Eighth Circuit Court of Appeals reported at 264 F.3d 792 (8th Cir. 2002) and reprinted in the Appendix ("App.") at App. p. 13. The District Court's Order on the Summary Judgment Motion is unreported and reprinted in the Appendix at App. p. 10. The order denying the Motion for Rehearing en banc is unreported and reprinted in the Appendix at App. p. 33.

JURISDICTION

Invoking federal jurisdiction under 28 U.S.C. §§1331 and 28 U.S.C. §2401(b), Respondent brought suit in the United States District Court for the Southern District of Missouri. On December 8, 1999, the Court, at first, rejected Respondent United States' Motion for Summary Judgment. Approximately one month later the Court reversed itself and granted the Respondent United States'

Motion for Summary Judgment based on the theory that McCoy's claim was time barred since McCoy had filed his administrative claim more than two years after the amputation of his leg at the Springfield Federal Medical facility, which exceeded the statute of limitation under 28 U.S.C. §2401(b). (App. pp. 12-14.) The Petitioner McCoy filed an appeal with the Eighth Circuit Court of Appeals arguing that the administrative claim was timely because the statute of limitations had been tolled by the continuing treatment doctrine. The Eighth Circuit Court of Appeals disagreed and affirmed that the District Court had not abused its discretion in determining that the statutes of limitation had expired. (App. pp. 1-20.)

The jurisdiction of this Court to review the judgment of the Court of Appeals is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves interpretation of the Federal Tort Claims Act located at 28 U.S.C. §2675(a).

STATEMENT OF CASE

This case concerns the proper interpretation of the continuing treatment doctrine as it applies to the tolling of the two year statute of limitations at 28 U.S.C. §2401(b).[1] This is key to the ability of the Petitioner McCoy to proceed on his claim against the United States for the Federal Tort Claims Act (hereinafter "FTCA"). This Supreme Court has held that the FTCA claim for medical malpractice accrues when a plaintiff becomes aware of his injuries and its probable cause. See *United States v. Kubrick*, 444 U.S. 111, 122-123 (1979). The District Court found that McCoy's claim was barred by statute of limitations contained in §2401(b) because McCoy knew of the government's breach of duty as soon as his leg was amputated. (App. p. 18.)

The Petitioner, Steven McCoy (hereinafter McCoy), was

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[1] 28 U.S.C. §2401(b) provides that:

> A tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues or unless action is begun within six months after the date of mailing, by certified or registered mail, of notice of final denial of the claim by the agency to which it was presented.

confined in federal prison from June 25, 1996 through April 16, 1999.[2] On January 29, 1999, Mr. McCoy filed a Federal Tort Claims Act (hereinafter FTCA) claim against the United States. In his claim, McCoy alleged that his right leg was amputated on January 23, 1997 and that he had been mis-diagnosed and mistreated for severe peripheral vascular disease and osteomyelits because of an infection he had developed in June of 1996. (App. pp. 3-6.)

McCoy was seen in June of 1996 by B. Ezaz, M.D., complaining of foot lesions. He was treated with antibiotics and anti-inflammatory agents. After Mr. McCoy was transferred to FSI at Allenwood, Pennsylvania in August of 1996 he was treated at that institution with antibiotics and dressing changes by, and under the directions of, R. Migliorno, D.O. (clinical director of the institution's medical facilities.) During the course of his treatment at Allenwood, and in approximately October of 1996, Mr. McCoy was seen by

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[2] (1) FMC Fort Worth, Texas (June 25, 1996 through July 19, 1996); (2) Oklahoma City, Oklahoma (July 19, 1996 through August 6, 1996); (3) SCI, Allenwood, Pennsylvania (August 6, 1996 through January 21, 1997); (4) USMCFP. Springfield, Missouri (January 21, 1997 through December 16, 1997); (5), SCI, Allenwood, Pennsylvania (December 16, 1997 through March 2, 1998); and (6) USMCFP, Springfield, Missouri (March 2, 1998 through April 16, 1999).

James W. Morgan, M.D., a surgeon at Lewisburg, Pennsylvania. (App. p. 4.)

On January 21, 1997, Mr. McCoy was transferred to the United States Medical Center for federal prisoners in Springfield, Missouri. After arrival at the Medical Center, Mr. McCoy came under the care of Dr. M. H. Choudhury, M.D. at the Surgical Center. He was treated by various doctors and for various conditions, including vascular disease. (App. pp. 5-6.) At the time Mr. McCoy had dark discoloration and a blistering ulceration with shivering as a result of gangrene of his left lower extremity. He was admitted to in-patient service by Dr. Choudhury and signed the consent form for the amputation of the leg. On January 23, 1997, the left lower extremity was amputated by Dr. Harris at the United States Medical Center for federal prisoners in Springfield, Missouri. (App. pp. 5-6.) Subsequent to the amputation, Mr. McCoy was repeatedly treated because the stump wound would not heal. He had a number of additional surgeries to close the wound, to attempt skin graphs and a bone resection. (App. p. 15.) In March of 1997, three months after the surgery and years after unsuccessful treatment for vascular

disease, the doctors began to suspect Buerger's disease. The doctors finally informed Mr. McCoy of this suspicion in April of 1997. Mr. McCoy was never told to stop smoking, which is the only treatment for Buerger's disease. (App. 16.) Mr. McCoy was seen and treated on a regular basis for conditions relating to his amputation by the physicians at the Surgical Center until his release.

The Eighth Circuit affirmed the District Court's decision and held that McCoy's administrative claim filed with the government had failed to raise the issue of continuing negligent treatment of the administrative claim. (App. p. 18.) Thus, the Eighth Circuit ruled that the continuing treatment doctrine enunciated *Wehrman v. United States*, 830 F.2d 1480 (8th Cir. 1987) was inapplicable because the continuing treatment doctrine will only toll the statutes of limitation under 28 U.S.C. §2401(b) if the tortious conduct was of a continuous nature. (App. p. 18.) The Eighth Circuit Court of Appeals also declined to accept a different version of the continuing treatment doctrine which had been adopted in the Fourth and Second Courts of Appeal in the cases of *Otto v. Nat'l Inst. of Health*, 815 F.2d 985 (4th Cir. 1987) and *Ulrich v. Veterans Admin. Hosp.*, 853

F.2d 1078 (2nd Cir. 1988). (App. pp. 17-18).[3]

The theories adopted by the Courts of Appeal in *Otto* and *Ulrich* do not require that the entire course of the treatment be negligent to toll the statute of limitations, but only some portion of the treatment to be negligent. *Otto v. Nat'l Inst. of* Health, 815 F.2d *supra* at 987. This version of the doctrine permits a wronged patient to benefit from his physician's corrective efforts without disruption of the malpractice suit. *Id.* at 989. See also *Ulrich v. Veteran's Administration Hospital*, 853 F.2d *supra* at 1080-81. The decision of the Eighth Circuit Court of Appeals was filed with a dissent by the Honorable McMillian who argued that the administrative claim made by the Petition was sufficient to put the federal government on notice of the Petitioner's claim and that the statutes of limitation should have been tolled by the continuing treatment doctrine. (App. pp. 20-32.)

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[3] The Eighth Circuit Court of Appeals specifically noted that there was a "split in the Circuits." The Court noted, "The continuous (or continuing) treatment doctrine will, in certain cases, toll the statutes of limitation during the course of treatment. There are two variations of the continuing treatment doctrine in use in the Circuits." (App. p. 19.) The Ninth Circuit Court of Appeals is in agreement with the Eighth Circuit Court of Appeals in that the claim under FTCA arises when the patient learns or should have known of the medical malpractice. See *Ashley v. United States*, 413 F.2d 490, 492 (9th Cir. 1969).

A motion for rehearing en banc was filed arguing that the administrative claim had included a continuous negligent treatment claim and that the Eighth Circuit should accept the rationale adopted in the *Otto* and the *Ulrich* cases, *supra.* The motion for rehearing en banc was denied with three dissents. (App. p. 33.)

The first basis relied on by the Circuit Court of Appeals to deny Mr. McCoy's claim was that he did not raise an issue of "continuing" negligent treatment in his administrative claim. (App. pp. 17-18.) In his administrative claim, McCoy asserted that physicians for the United States federal prison in Springfield were negligent in the treatment of Mr. McCoy's ailment in a number of ways:

> The loss of Mr. McCoy's left leg was directly caused by the negligence of agents and/or employees of the United States including but not limited to the following individuals who began treating Mr. McCoy on or about June 25, 1995; Robert Migliorino, D.O., B. Ezaz, M.D., Robert Manenkoff, P.A., Jim Parush, P.A., D. Krout, L.P.N., Bhatti, P.A., B. Nwankno, P.A., Kevin Welsh, M.D., as well as others. Said

medical providers were negligent in the treatment of Mr. McCoy in one or more of the following respects:

A. They failed to appreciate the seriousness of Mr. McCoy's left heal lesion and treat it in a timely and adequate fashion.

B. They failed to treat Mr. McCoy's pre-existing peripheral vascular disease when they knew or should have known of its presence from prior medical records and treatment.

C. Failed to timely order an arteriorgram, doppler test or other tests which would have revealed the presence of significant peripheral vascular disease at a point in time where said disease was still treatable.

D. The failed to read or appreciate the significance of Mr. McCoy's history including his preexisting peripheral vascular disease which resulted in the loss of his right leg.

E. Failed to refer Mr. McCoy to a specialist in

> vascular disease and other specialist in a timely manner when they knew or should have known that Mr. McCoy was in need of treatment from a vascular specialist and that further testing was indicated. (Emphasis added). (App. p. 6.)

As is noted in the dissent, an administrative claim under the FTCA need to do no more than provide sufficient information to allow an agency to administratively process the claim. (App. p. 23.) See *Dundon v. United States*, 559 F.Supp. 469, 477 (E.D. N.Y. 1983). The failure for McCoy to include a single word ("continuing") should not have been used to bar a cause of action that would compensate a person for negligent care that resulted in the amputation of his leg. McCoy's administrative claim noted that doctors failed to appreciate the seriousness of his condition, failed to treat the pre-existing peripheral vascular disease and failed to understand the significance of Mr. McCoy's medical history. The administrative claim is evidence that McCoy was claiming that the failure to diagnose and to adequately treat his peripheral vascular disease was a tort of a continuing nature. (App. pp. 5-6.) The

administrative claim is adequate to put any party on notice that continuing negligence is being alleged. Even the rejection by the regional counsel of the Federal Bureau of Prisons, Henry J. Sadowski, noted that the claim alleged "substandard medical treatment resulting in the amputation of Mr. McCoy's left leg." (App. p. 23.) Under the broader standards of "notice pleading" in the federal judiciary, this administrative claim provides adequate notice of the cause of action being alleged.[4] In McCoy's administrative claim the ongoing nature of negligence was alleged and the agency had sufficient notice to respond to the claim.

The Eighth Circuit Court of Appeals held that the continuing treatment doctrine did not toll the statute of limitations under the rules used in *United States v. Kubrick*, 444 U.S. 111 (1979) and *Reilly v. United States*, 513 F.2d 147 (8th Cir. 1975). The Court believed that the continuing treatment doctrine did not apply if "the

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[4] Even under the stricter requirements of a "fact pleading" jurisdiction, such as Missouri, one only has to allege specific acts with "sufficient certainty to advise a defendant of what charges to meet" and then "avers that the act was negligently done" to survive a motion to dismiss. See *Phillips v. Carroll*, 379 S.W.2d 143, 145 (Mo. App. E.D. 1964). McCoy administrative claim alleged a series of acts that were performed negligently.

claimant is aware of the acts constituting negligence." (App. p. 19.) McCoy alleged that the treating physician and other medical personnel failed to properly diagnose and treat his peripheral vascular disease. There is no evidence in the record that he knew or should have known the doctor was not treating him correctly. In fact, as noted by the dissent, a note in the hospital file indicated that the Appellant was satisfied with the treatment. (App. p. 23.) These acts of negligence had a number of consequences, the most severe of which was the amputation of McCoy's left leg. But the amputation was not the only consequence of the malpractice that McCoy suffered. McCoy alleged that his doctors continued to mistreat McCoy by a failure to timely diagnose and successfully treat the vascular disease commonly known as Buerger's disease, which resulted in three further operations on the stump of his amputated leg. Medical personnel did not even advise McCoy to stop smoking, the most rudiment and basic treatment of his ailment. (App. p. 16.) To conclude that when his leg was amputated Mr. McCoy had knowledge that he was suffering from peripheral vascular disease is not consistent with the record before the District or the Circuit Court.

The District Court and the Circuit Court focused only on the amputation and gave *Kubrick v. United States*, *supra* a narrow and crabbed interpretation. The obvious burden for such a rigid application the *Kubrick* "discovery doctrine" places on a layman is obvious. It proposes a role reversal for McCoy and his doctors. Subtleties of symptoms of an ailment like peripheral vascular disease can make the incompetent treatment of the patient difficult, if not impossible, for the patient to recognize. Slow healing wounds may have other causes.

In its opinion in chief the Circuit Courts of Appeal relied on *Reilly v. United States* to affirm the District Court's determination that McCoy knew of his doctor's breach of duty as soon as his leg was amputated. (App. p. 19.) As noted by Judge McMillian in the dissent in this opinion, the *Reilly* case should be used to support the application of the continuing treatment doctrine to toll the FTSC's statute of limitation:

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> Rather, the rule [the continuing treatment doctrine] is premised on the notion that a person should not be required

> to investigate the cause of his injuries or to bring suit while receiving necessary treatment for the injuries. The interest in preventing stale claims convinces us that this rationale for the rule has no merit when a person knows of the acts constituting negligence. In this situation little, if any, investigation is necessary to determine whether a meritorious cause of action exists. A different situation is posed, however, when a person does not know of the acts constituting negligence. Under these circumstances the rationale for the continuous treatment test has value in determining the exercise of reasonable diligence to discover the acts constituting negligence. In the case sub judice there exist factors in addition to continuous treatment which necessary enter into a determination of reasonable diligence.

(App. p. 31) (underscored text cited in *Reilly*) citing *Tyminski v. United States*, 481 F.2d 257, 265 ct.n.5 (3rd Cir. 1973).

Judge McMillian went on to note:

> Thus, even though the language used in *Reilly* to reject applying the continuing treatment doctrine refers to the

> tolling of the running of the statute of limitations, the analysis actually refers to the accrual of the cause of action because that is the context in which the continuing treatment doctrine is discussed in both *Reilly* and in *Tyminski*, the case upon which it relies.

(App. p. 31.)

As is so succinctly put by Judge McMillian, there is nothing in *Reilly* which would prohibit the tolling of the FTCA in light of the continuing negligent treatment of McCoy.

It is believed that *Wehrman v. United States*, 830 F.Supp. 1480 (8th Cir. 1987) applies directly to the facts in this case. In *Wehrman*, a patient was incompetently treated for 22 years by various "agents, servants and employees of the Veteran's Administration." *Id.* at 1482. The medical personnel of the hospital had always advised against surgery for these conditions. *Id.* Finally, the Appellant sought outside advice and surgery was performed. Surgery was successful and the Appellant sued. The Court held that even though *Wehrman* was treated by a number of different physicians over his 22 year period, the statute of limitation was tolled

on his cause of action because of the continuing treatment doctrine. *Id.* at 1484-1485. In fact, under the continuing treatment in this case, Plaintiff's cause of action did not accrue until the tortious continuing treatment ended. *Id.* at 1483.

Furthermore, the reversal of this decision in this case would also remedy a conflict between the two variations of the continuing treatment doctrine in the federal circuits between the Eighth, and most notably, the Fourth and Second Circuit Courts of Appeal. In *Otto v. Nat'l Inst. of Health*, 815 F.2d 985 (4th Cir. 1987) and *Ulrich v. Veterans Admin. Hosp.*, 853 F.2d 1078 (2nd Cir. 1980) the Circuit Courts of Appeal held that the continuing treatment doctrine is not limited to continuing negligent treatment. As noted by the Court in *Otto*:

> Under the doctrine, the patient is excused from challenging the quality of care being rendered until the confidential relationship terminates. *Brown v. United States*, 353 F.2d 578, 580 (9th Cir. 1965). Stated another way, the doctrine permits a wronged patient to benefit from his physician's corrective efforts without the disruption of a malpractice

action.

Otto v. Nat'l Inst. of Health, 815 F.2d *supra* at 988.

In this case the Eighth Circuit Court of Appeals relied on the fact that McCoy allegedly knew of the "negligence" as soon as his leg was amputated. (App. p. 17). Such a circumstance requires the assumption that a patient can be versed in the medical arts sufficiently to interpret his treatment to determine if the care he received is negligent. As noted by the Court:

> The second rationale for the doctrine holds its absurd to expect a patient being treated by a doctor or hospital to interrupt corrective treatment by instituting suit against either while under their continuing care. The patient's relationship with those caring for him is based upon trust in their medical skills. Where corrective treatment is needed, it often would be so plainly contrary to the patient's own interests in his cure and recovery to disrupt his relationship by serving a summons and complaint on those caring for him as to make the requirement to sue nonsensical. (citations omitted.)

Ulrich v. Veterans Admin. Hosp., 853 F.2d *supra* at 1081.

In the present case, the Petitioner presented to the District Court and Circuit Court of Appeals evidence, in the form of medical records, that Petitioner did not know that his treatment was negligent even in light of the previous amputation.

The Eighth Circuit determination that the statute of limitation is not tolled by the continuos treatment doctrine if the patient is assumed to know the treatment is negligent is inconsistent and, it is respectfully submitted, illogical in light of the burden it places on the Petitioner. Many persons are diagnosed for illnesses or other conditions of their health for which the duration of treatment is many months or years. In the present case, the Petitioner was treated by the physicians at the Springfield Medical facility for at least fourteen months after his amputation. The Petitioner did not know and was not treated for a vascular disease (Buerger's disease) before the amputation. The physicians treating Mr. McCoy did not tell him he had Buerger's disease even after he was diagnosed some three months after the amputation. The physicians finally told Mr. McCoy in April of 1997 that he had this vascular disease. (App. p.

16.) This failure to diagnose and properly treat does not begin and end with the amputation of his leg in January of 1997. The failure to diagnose and to treat the disease before and after the amputation are inextricably intertwined as part of his complete treatment for this disease. At the very least, the statute of limitations should be tolled until the existence of the disease was finally disclosed to Mr. McCoy, in April 1997. As noted in the administrative claim and Petition, Mr. McCoy has alleged that the treatment included the failure to diagnose the disease and treat it before and after the amputation. The continuing treatment doctrine should apply to toll the statute of limitations at least to the date when Mr. McCoy was properly diagnosed. The Eighth Circuit Court of Appeals, however, decided that the Petitioner knew, or should have known, the physician's treatment was negligent on the date his leg was amputated. (App. p. 18). But such conclusion imposes a heavy burden on the Petitioner to have intimate knowledge of the art of the medical practice and to have to interpret his treatment to file a claim. Ironically, if this Eighth Circuit Court of Appeals rationale is followed, the longer a patient is treated for a medical condition the greater the risk he may

run of having his claim barred by the statutes of limitation.

This decision of the Circuit Court of Appeals also is an unfair result to the Petitioner because its result and the denial of the claim is based only on the geographical location of the medical treatment. Since McCoy was confined in the Springfield Federal Medical facility he had no freedom to seek treatment at any other location for his medical condition. It is clear from the decisions in *Otto* and *Ulrich* that if the McCoy claim had been brought in the Second or Fourth Circuit Courts of Appeal that the statutes of limitation would have been tolled and the Petitioner could have pursued his medical malpractice claim. In the Eighth Circuit, however, the Petitioner cannot because the Eighth Circuit Court of Appeals will only permit the continuing treatment doctrine to apply if the treatment is continually negligent. The inconsistent imposition of this doctrine results in an inconsistent application of the statute of limitation due to nothing more than an accident of geography.

CONCLUSION

Petitioner urges this Court to clarify the issues concerning the continuing treatment doctrine presented in this case, restore the

balance and fairness of the continuing treatment doctrine among the Circuit Courts of Appeal and respectfully request this Court to grant this Writ of Certiorari.

Respectfully submitted,

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TABLE OF CONTENTS

Administrative Claim A-1

Federal Complaint A-8

Amended Order for Summary Judgment A-12

Eighth Circuit Opinion dated August 31, 2001 ..... A-15

Order Denying Petition for Rehearing
dated October 31, 2001 ..... A-33

VIA FEDERAL EXPRESS

Ms. Kathleen Hawk Sawyer
Director Federal Bureau of Prison
320 First Street, N.W.
Washington, D.C. 20534

Re: Steven McCoy v. United States

Dear Director:

I am a licensed attorney practicing in the state of Missouri. I have been retained to represent Steven McCoy who is a federal prisoner incarcerated at the United States Medical Center for Federal Prisoners in Springfield, Missouri. I am enclosing a standard Form 95 which has been filled out by myself. I am submitting Mr. McCoy's claim under the Federal Tort Claims Act for damages he suffered as a result of the amputation of his left leg which resulted from sub-standard treatment by Bureau of Prison medical providers. I have signed the claim on behalf of Mr. McCoy as his legal representative and attorney. For proof of that representation I am also enclosing a signed copy of the contingent fee agreement with Mr. McCoy.

Please acknowledge receipt of these documents at your earliest convenience. As I was recently retained in this matter, I am not yet in possession of all of Mr. McCoy's medical records. However, I intend to supplement the documentation submitted with this claim in the near future once that documentation is obtained. If you or your department have any questions concerning this claim, please do not hesitate to contact me by phone or at the above address. I look forward to working with your department in bringing this claim to a resolution.

Very truly yours,

_____

Signed by Robert O'Neal

RCO/dms
Enclosure
127004

CLAIM FOR DAMAGE, INJURY, OR DEATH

Submit to: Federal Bureau of Prisons
320 First Street N.W.
Washington, D.C. 20534

Name and Address of Claimant:
Claimant Steven McCoy
#39314-053
U.S. Medical Center
P.O. Box 4000
Springfield, MO 65801
(Also see attached)

Date of Birth: 06/18/60

Marital Status: Single

Date and Day of Accident: Leg amputated 02/10/97

Time: N/A

Basis of Claim: See attached. Attached medical records are part of this claim and provide evidentiary support for the basis of the claim as well as the nature and extent of Mr. McCoy's injuries.

Nature and Extent of Injury: Mr. McCoy suffered the amputation of his left, lower extremity below the knee as a result of the negligence of the individuals and others set forth in Paragraph 8. He has endured pain and suffering as a result of that amputation and prior thereto as a result of the failure of physicians and others to adequately treat his left foot wound. (See attached.)

Amount of Claim: $5,000,000.00

Personal Injury: $5,000,000.00

Total Claim: $5,000,000.00

Signed by Robert O'Neal, Attorney for Steven McCoy

Phone: 314-727-0101

Date of Claim: 1/29/99

2. Claimant's attorney is Robert C. O'Neal
Riezman & Blitz, P.C.
7700 Bonhomme, 7th Floor
St. Louis, Missouri 63105

8. Basis of Claim:

Claimant is a 38 year old black male currently incarcerated at the United States Prison at Springfield, Missouri. In December of 1994 he was incarcerated at the United States Prison at Allenwood, Pennsylvania and he was bitten by a brown recluse spider on his right calf. Thereafter, he developed a severe necrotic ulcer of his right calf that was initially treated at the prison. Due to the persistence of the ulceration, he was treated by private physicians and elsewhere. Several attempts at debridement and skin-grafting of the wound were unsuccessful. In March of 1995, Mr McCoy was transferred to U.S. Medical Center for Federal Prisoners in Springfield, Missouri for further treatment of the ulcerating wound. Again, several attempts at skin grafting were unsuccessful. Additional unsuccessful attempts at treading the wound were done at the Federal Medical Center in Rochester, Minnesota. In Rochester, a consultant with the Mayo Clinic determined that the failure of the wound to heal was due to significant, peripheral vascular disease in Mr. McCoy's lower leg. An arterial by-pass procedure was attempted without success and Mr. McCoy's right leg was amputated below the knee at the Osteopathic Medical Center of Texas on November 21, 1995.

The loss of Mr. McCoy's right leg was the subject of a previous Federal Tort Claim which was administratively denied. Thereafter, a lawsuit was filed on his behalf in the United States District Court for the Eastern District of Pennsylvania (Williamsport) Cause No. 97-CV-1099. Mr. McCoy's current counsel was not involved in that litigation and the case was dismissed in November of 1998. No recovery against any defendant in that matter was obtained.

The previous injury and its etiology is described above in some detail for the purpose of demonstrating the devastating impact of the loss of Mr. McCoy's left leg which is the subject of this federal tort claim. The history concerning Mr. McCoy's right leg is also rele-

vant insofar as it relates to the negligence of Bureau of Prison agents and employees in that the prior amputation resulted from vascular insufficiency in his right leg. The loss of Mr. McCoy's left leg, as will be further described, followed the same pattern as did his prior problem in his right leg. Given the devastating nature of the loss of Mr. McCoy's right leg and the etiology of the disease leading up to that loss the Bureau of Prison doctors and medical workers' failure to treat the vascular problems experienced by Mr. McCoy in his left leg appear more egregious. They failed to familiarize themselves with this past history and that failure lead to inadequate treatment for the similar problems which developed in Mr. McCoy's left leg, ultimately ending in the amputation of his left leg.

In June of 1996, Mr. McCoy was incarcerated at the Federal Prison in Fort Worth, Texas. The records indicate that he was seen by B. Ezaz, M.D. complaining of a left foot lesion on June 25, 1996 at the Fort Worth Medical Center. He was treated with Keflex (an antibiotic) and Indocin (an anti-inflammatory agent). Mr. McCoy continued to treat with Dr. Ezaz and was seen by physician's assistants at the Fort Worth Medical Center until he was transferred to the Federal Correctional Institution at Allenwood, Pennsylvania on August 6, 1996. He was initially seen by B. Nwankwo, P.A. on August 6, 1996. Thereafter, he was treated with antibiotics and dressing changes by and under the direction of R. Migliorno, D.O., the clinical director at the Allenwood Federal Medical Center. On August 8, 1996, he was seen by a podiatrist, Kevin M. Welsch, M.D. At that time, he had progressed to a full thickness ulcer in his left heal. Mr. Welsch listed the etiology as "unknown" and he did not appreciate any bacterial or other infection.

He was continued on antibiotics and daily dressing changes. This course of treatment continued at Allenwood until October 18, 1996 when he was seen by James W. Morgan, M.D. a surgeon in Lewisburg, Pennsylvania. Among other things, Dr. Morgan noted the prior history of peripheral vascular disease. He was unable to detect any pedal pulses and a doppler study showed diminished flow in the arteries supplying blood to Mr. McCoy's left lower extremity. He concluded "contributing to the indolence of the ulcer is evidence of significant peripheral, vascular occlusive disease." Dr. Morgan

also wrote, "according to the patient, the history of what happened on the right side is alarming. We want to make sure we don't let the same thing happen here by neglect." Dr. Morgan recommended that if there was not improvement of the lesion in a short time it would be "absolutely imperative that Mr. McCoy have a vascular evaluation with arterography and consideration for a vascular reconstruction, hopefully to prevent the events from deteriorating like they did on the other side."

Despite this warning, the ulcerating lesion continued to fester and grow. By October 21, 1996 D. Krout, L.P.N. at the Allenwood Federal Medical Center noted a "foul smelling odor." The lesion continued to increase in size through October of 1996. Despite no improvements, no medication or treatment for vascular disease was ordered.

On December 19, 1996 Mr. McCoy was seen by a podiatrist Kevin Welsch, M.D. who noted an odor and the presence of psuedomonas which were "a concern." By January 26, 1997, Dr. Miglorino noted there was deterioration of the circulation of Mr. McCoy's left foot and established gangrene. He recommended emergent hospitalization and vascular consult.

On January 6, 1997, Mr. McCoy was admitted to Williamsport Hospital in Williamsport, Pennsylvania under the care of Dr. H. Suter. Dr. Suter diagnosed arterial insufficiency, left leg, with ischemic ulceration of left foot. On January 9, 1997, Dr. Sutter performed a left femoral-distal popliteal artery and saphenous vein by-pass graft. The initial by-pass was unsuccessful and two subsequent procedures to clear the thrombosted arteries failed. Upon discharge from the hospital on January 21, 1997 it was the opinion of Dr. Suter that at least a below knee amputation of Mr. McCoy's left leg would be required.

Mr. McCoy was then transferred to the Federal Medical Center for Federal Prisoner's in Springfield, Missouri at which time his foot was wasting and continued to deteriorate.

In early February, 1997 Mr. McCoy's left lower leg was amputated as a direct result of the non-healing lesion which was caused by his peripheral vascular disease. Since that time he has suffered

from repeated open sores in the stumps of both legs and he has undergone several procedures for debridement and revision of open areas on his stumps.

The loss of Mr. McCoy's left leg was directly caused by the negligence of agents and/or employees of the United States including but not limited to the following individuals who began treating Mr. McCoy on or about June 25, 1995: Robert Migliorino, D.O.; B. Ezaz, M.D.; Robert Manenkoff, P.A.; Jim Parush, P.A.; D. Krout, L.P.N.; Bhatti, P.A.; B. Nwankno, P.A.; Kevin Welsch, M.D.; as well as others. Said medical providers were negligent in the treatment of Mr. McCoy in one or more of the following respects:

A. They failed to appreciate the seriousness of Mr. McCoy's left heal lesion and treat it in a timely and adequate fashion.

B. They failed to treat Mr. McCoy's pre-existing peripheral vascular disease when they knew or should have known of its presence from prior medical records and treatment.

C. Failed to timely order an arteriorgram, doppler test or other tests which would have revealed the presence of significant peripheral vascular disease at a point in time where said disease was still treatable.

D. They failed to read or appreciate the significance of Mr. McCoy's history including his pre-existing peripheral vascular disease which resulted in the loss of his right leg.

E. Failed to refer Mr. McCoy to a specialist in vascular disease and other specialist in a timely manner when they knew or should have known that Mr. McCoy was in need of treatment from a vascular specialist and that further testing was indicated.

10. (Continued) Mr. McCoy is now totally and permanently disabled and confined to a wheelchair. Mr. McCoy is scheduled to be released from the Federal Penitentiary in April of 1999 and his future is bleak at best. He is and will be unemployable for the remainder of his life. He has lost wages and will continue to lose wages for the rest of his life. He will be forced to incur medical expenses for the treatment of his condition in the future and he will

incur medical expenses for psychological trauma which resulted from the loss of his lower limb. Mr. McCoy's future lost wages are estimated at $1,000,000.00 through retirement at age 65. Future medical expenses are undetermined but are expected to be near $200,000.00.

127001

United States District Court

FOR THE WESTERN DISTRICT OF MISSOURI

SOUTHERN DIVISION

STEVEN McCOY,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Cause No.
	)	
UNITED STATES OF AMERICA,	)	
	)	
Defendant.	)	

COMPLAINT

Comes now the Plaintiff Steven McCoy, by and through his counsel, and for his cause of action against the Defendant the United States of America, states as follows:

1. Plaintiff Steven McCoy was a federal prisoner incarcerated at institutions operated by the United States Bureau of Prisons from 1993 through April of 1999.

2. The Bureau of Prisons is an agency of the United States of America and employs individuals who furnish medical treatment to federal prisoners including the Plaintiff herein.

3. This action arises under the Federal Tort Claims Act 28 U.S.C. 1346(b) and jurisdiction is invoked by reason of the fact that Plaintiff suffered injuries from the negligent act of employees of the United States who were acting within the scope of their employment.

4. A portion of the negligent acts complained of occurred in this judicial district and venue is proper pursuant to 28 U.S.C. §1402(b).

5. Plaintiff timely filed a claim with the Bureau of Prisons concerning his injuries and Plaintiff was notified of denial of his claim on or about February 17, 1999. All administrative procedural pre-conditions to this action have been met.

6. On or about June 25, 1996, Plaintiff was incarcerated at the Federal Correctional Center in Fort Worth, Texas and he developed a lesion on his left foot.

7. Thereafter Plaintiff was treated by numerous physicians, physician's assistants, technicians, nurses and other medical personnel who were agents and employees of the United States and who were acting in the scope of their employment while treating Plaintiff.

8. One or more of the foregoing agents and employees of the United States was negligent in the care and treatment of the Plaintiff beginning on or about June 25, 1999 (SIC) and continuing thereafter until Plaintiff was released from federal confinement in April of 1999 and such negligence is more particularly described as having occurred in one or more of the following respects:

    a. They failed to make an accurate and complete diagnosis of the Plaintiff's condition;

    b. They failed to appreciate the seriousness of Mr. McCoy's left heel lesion and treat it in a timely and adequate fashion;

    c. They failed to treat Mr. McCoy's pre-existing peripheral vascular disease when they knew or should have known of its presence from prior medical records and treatment;

    d. They failed to timely order an arteriorgram, doppler test or other tests which would have revealed the presence of

significant peripheral vascular disease at a point in time in which the disease was still treatable;

e. They failed to read or appreciate the significance of Mr. McCoy's history including his pre-existing peripheral vascular disease which had resulted in the loss of his right leg;

f. They failed to refer Mr. McCoy to a specialist in vascular disease or other qualified specialist in a timely manner when they knew or should have known that Mr. McCoy was in need of treatment from a specialist and that further testing was indicated;

g. They failed to prescribe adequate and proper medications including but not limited to anti-coagulants when they knew or should have known that Plaintiff's condition required treatment with same;

h. They failed to adequately advise the Plaintiff concerning the hazards of tobacco use and its debilitating effects upon his pre-existing disease when they knew or should have known that Plaintiff was suffering from vascular problems which were aggravated by his tobacco use.

9. As a direct and proximate result of the negligence of the agents and employees of the United States as aforesaid, Plaintiff has been damaged in the following respects:

a. He has suffered the amputation of his left lower leg.

b. He has suffered from infection, wasting and lesions of the left leg and has undergone several surgical procedures for the treatment of same;

c. He has endured pain and suffering and will be caused to endure pain and suffering in the future as a result of his injuries;

d. He has incurred substantial medical bills and will be caused to incur medical bills in the future as a result of his condition;

e. He has been disabled for the remainder of his life;

f. He has and will be unable to obtain employment and he has and will lose wages and income he would otherwise have been able to earn but for his injuries;

g. He has lost the enjoyment of life and will continue to be deprived of the ability to enjoy life in the future.

WHEREFORE, Plaintiff prays for a judgment against the United States in a sum of money in excess of $1,000,000.00 which will fairly and adequately compensate for his injuries together with costs and attorney's fees herein.

RIEZMAN & BLITZ, P.C.

Signed by Henry T. Herschel #30813
7700 Bonhomme, 7th Floor
St. Louis, Missouri 63105
(314) 727-0101 (phone)
(314) 727-6458 (facsimile)

136614

In the United States District Court

FOR THE WESTERN DISTRICT OF MISSOURI

SOUTHERN DIVISION

STEVEN McCOY,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	No. 99-3287-CV-S-RGC
	)	
UNITED STATES OF AMERICA,	)	
	)	
Defendant.	)	

ORDER

On December 8, 1999 the Court denied the defendant's motion for summary judgment. On December 10, 1999 the defendant filed a motion to reconsider the order of December 8. The defendant claims that the claim is barred as it was not presented to the federal agency within two years after the claim occurred, 28 U.S.C. §2401(b).

Plaintiff's leg was amputated on January 23, 1997. Plaintiff did not present a claim to the Bureau of Prisons until January 29, 1999.

Plaintiff alleged that the defendant's agent was negligent in one or more of the following:

a. They failed to make an accurate and complete diagnosis of the plaintiff's condition;

b. They failed to appreciate the seriousness of Mr. McCoy's left heel lesion and treat it in a timely and adequate fashion;

c. They failed to treat Mr. McCoy's pre-existing peripheral vascular disease when they knew or should have known of its presence from prior medical records and treatment;

d. They failed to timely order an arteriorgram, doppler test or other tests which would have revealed the presence of significant peripheral vascular disease at a point in time in which the disease was still treatable;

e. They failed to read or appreciate the significance of Mr. McCoy's history including his pre-existing peripheral vascular disease which had resulted in the loss of his right leg;

f. They failed to refer Mr. McCoy to a specialist in vascular disease or other qualified specialist in a timely manner when they knew or should have known that Mr. McCoy was in need of treatment from a specialist and that further testing was indicated;

g. They failed to prescribe adequate and proper medications including but not limited to anti-coagulants when they knew or should have known that plaintiff's condition required treatment with same;

h. They failed to adequately advise the plaintiff concerning the hazards of tobacco use and its debilitating effects upon his pre-existing disease when they knew or should have known that plaintiff was suffering from vascular problems which were aggravated by his tobacco use.

In ruling a motion for summary judgment, the Court should consider the facts established by the record, Rosehick v. Prudent Supply, Inc., 830 F.2d 1497 (8th Cir. 1987).

In Kubrick v. United States, 444 U.S. 111, 100 S. Ct. 352, 62 L.Ed.2d 259 (1979) it was held that the statute meant what it said; that the malpractice act ran out not until plaintiff knew or could be expected to know the government's breach of duty, the plaintiff knew as soon as the leg was amputated. Plaintiff's claims were more than two years old.

The Court denied the motion for summary judgment on the basis of ongoing treatment. That has nothing to do with the claim.

It is ORDERED the motion to reconsider the Order of December 8, 1999 is granted; and it is further ORDERED the defendant's motion for summary judgment is granted.

Signed by RUSSELL G. CLARK
SENIOR JUDGE
UNITED STATES DISTRICT COURT

Date: January 06 2000

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 00-1375

STEVEN McCOY,	*	
	*	
Plaintiff – Appellant,	*	
	*	Appeal from the United
v.	*	States District Court for
	*	the Western District of
UNITED STATES OF AMERICA,	*	Missouri
	*	
Defendant – Appellee.	*	

Submitted: November 13, 2000

Filed: August 31, 2001

Before McMILLIAN, RICHARD S. ARNOLD, and BYE, Circuit Judges.

BYE, Circuit Judge.

Steven McCoy appeals from the grant of summary judgment to the government on his claim pursuant to the Federal Tort Claims Act (FTCA), 28 U.S.C. § 2672. We affirm.

I

McCoy was convicted of drug conspiracy charges and incarcerated in various federal penal facilities from 1993 to April 16, 1999. Sometime in 1994, he was bitten on the right leg by a spider and he sought treatment at the infirmary. Several attempts to treat the infection failed. Eventually, doctors diagnosed peripheral vascular disease and attempted an arterial bypass. When this too failed, Mr. McCoy's right leg was amputated in 1995.

In June 1996, McCoy noticed lesions on the heel of his left foot. He again sought treatment, and again the treatment was unsuccessful. McCoy was transferred to several different medical facilities, and received treatment from several different doctors. While one doctor had recommended that he be evaluated for vascular disease, he did not receive treatment for vascular disease in the left leg until January 1997. A vascular bypass and other attempts to clear the artery failed. He developed gangrene in his left foot. On January 23, 1997, doctors at the United States Medical Center for federal prisoners in Springfield, Missouri amputated his left leg below the knee.

Subsequent to the amputation, the stump wound on McCoy's left leg did not heal. He underwent several more surgeries to close the wound, to attempt skin grafts, for a stump revision and for a bone resection. In March 1997, his doctors first began to suspect Buerger's disease;[1] however, they did not inform him of this suspicion until April 1997. He was not advised to quit smoking, which is the only known effective treatment for Buerger's disease. He continued to receive treatment for complications from the amputation until his release from the federal system in April 1999.

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[1]Buerger's disease is an inflammation of the arteries, veins and nerves, primarily in the legs, causing restricted blood flow. It occurs primarily in younger men (ages 20–40) who are heavy smokers. There is no known cure. Abstinence from tobacco use is the only known method of arresting the disease. If untreated, Buerger's disease can lead to gangrene in the affected limb, which will necessitate removal of the limb. See The Gale Encyclopedia of Medicine 547–48 (Donna Olendorf et al. eds., 1999).

On February 1, 1999, McCoy filed an administrative claim with the Bureau of Prisons (BOP). He alleged malpractice which resulted in the amputation of his left leg.[2] McCoy's claim also states that "[s]ince that time he has suffered from repeated open sores in the stumps of both legs and he has undergone several procedures for debridement and revision of open areas on his stumps." The BOP rejected the claim as untimely, since the amputation occurred more than two years before McCoy filed his claim.

McCoy filed suit in federal district court on August 5, 1999, alleging negligent failure to diagnose and treat vascular disease resulting in the amputation of his left leg, past and ongoing pain and suffering, medical bills, permanent disability, loss of future wages, and loss of enjoyment of life. The government filed a motion for summary judgment, asserting that his claim was time-barred since he had filed his administrative claim more than two years after the amputation. McCoy argued that the "continuing treatment" doctrine tolled the limitations period. The district court originally accepted McCoy's argument, but later granted the government's motion for reconsideration and entered summary judgment for the government. McCoy now appeals the sole issue of whether the statute of limitations bars his action.

II

An action may not be commenced in federal court under FTCA unless the plaintiff has first presented his claim to the appropriate federal agency, and that claim has been denied. See 28 U.S.C. § 2675(a). Further, "[a] tort claim against the United States shall be

[2]McCoy had previously filed a claim alleging malpractice associated with the treatment and eventually amputation of his *right* leg. That claim was also denied. McCoy subsequently filed suit in the United States District Court for the Middle District of Pennsylvania (Case Number 97-CV-1099), but his suit was dismissed. That dismissal is not the subject of this lawsuit

forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues . . . " 28 U.S.C. § 2401(b). A plaintiff's compliance with the two-year limitations period is a jurisdictional prerequisite, since the FTCA acts as a waiver of the federal government's sovereign immunity. See Walker v. United States, 176 F.3d 437, 438 (8th Cir. 1999).

The Supreme Court has held that an FTCA claim for medical malpractice accrues when a plaintiff becomes aware of his injury and its probable cause. United States v. Kubrick, 444 U.S. 111, 122 (1979). The district court found that McCoy's claim was barred by statute of limitations in § 2401(b) because McCoy knew of the government's "breach of duty" as soon as his leg was amputated. The district court also determined that McCoy's claim of continuing treatment had "nothing to do with the claim." It is undisputed that McCoy filed his administrative claim more than two years after the amputation of his left leg.

McCoy argues that his claim is not time-barred. He argues that his administrative claim alleged more than mere negligence in the amputation of his leg, and included a claim of negligence in failing to diagnose and treat his Buerger's disease. Because the entire course of diagnosis and treatment including the post-amputation treatment of the stump wounds was negligent, he argues that the "continuous treatment" doctrine tolls the statute of limitations during that period. As a matter of policy, McCoy asserts that he should not have to file a claim against his doctors while he is being continuously treated by those same doctors.

The government asserts that McCoy's claim did not allege malpractice in the diagnosis and treatment of Buerger's disease, but only malpractice resulting in the loss of his leg, and that he is bound by the claims made in his administrative claim. Negligent treatment of his vascular disease thus cannot be raised in federal court, because McCoy did not raise it in his administrative claim and therefore did not exhaust his administrative remedies with regard to that claim. The government further argues that since McCoy did not allege continuing negligent treatment in his administrative claim, the continuous treatment doctrine will not apply. Because the date his leg was amputated was a date certain, and because there could

be no continuing "treatment" to correct the error resulting in the loss of his leg, he was therefore required to file his administrative claim within two years of the amputation.

The continuous (or continuing) treatment doctrine will, in certain cases, toll the statute of limitations during the course of treatment. There are two variations of the continuing treatment doctrine in use in the circuits. We have previously examined both. See Wehrman v. United States, 830 F.2d 1480 (8th Cir. 1987); Reilly v. United States, 513 F.2d 147 (8th Cir. 1975).

In Wehrman, we described the doctrine as follows: "Under the continuing treatment doctrine, a plaintiff's cause of action does not accrue until the tortious continuing treatment ends, even if the plaintiff is aware of the facts constituting negligence before that time." Id. at 1483. The panel specifically noted that "where the tortious conduct is of a continuous nature, the Kubrick rule does not apply." Id. at 1485 (quoting Gross v. United States, 676 F.2d 295, 300 (8th Cir. 1982)). Wehrman provides no assistance to McCoy because he failed to raise an issue of continuing *negligent* treatment in his administrative claim.[3] A litigant may not base any part of his tort action against the United States on claims that were not first presented to the proper administrative agency. See Provancial v. United States, 454 F.2d 72, 74–75 (8th Cir. 1972). Because McCoy did not plead continuous negligent treatment, he has not tolled the statute under the Wehrman rule.

A different version of the continuing treatment doctrine has been adopted in other circuits, although not in ours. These circuits do not require that the entire course of treatment be negligent, but only that some portion of the ongoing treatment be negligent. The statute of limitations may be tolled during subsequent continuing treatment, even if non-negligent. See, e.g., Otto v. Nat'l Inst. of Health, 815 F.2d 985, 988 (4th Cir. 1987) ("[W]here there has been a course of

[3]The district court determined that McCoy's administrative claim cannot be fairly read to encompass his failure to diagnose and treat claim. We do not find this determination to be clearly erroneous. See Walker, 176 F.3d at 438.

continuous medical treatment, a claim may not accrue until the end of that course of treatment, if the treatment has been for the same illness or injury out of which the claim for medical malpractice arose.") This version of the doctrine permits a wronged patient to benefit from his physician's corrective efforts without the disruption of a malpractice action. Id.; see also Ulrich v. Veterans Admin. Hosp., 853 F.2d 1078, 1080–81 (2nd Cir. 1988) (discussing rationales for continuous treatment doctrine). These circuits do not limit the continuous treatment doctrine to continuously *negligent* treatment.

We have rejected the form of the doctrine discussed in Otto. We have held that the continuing treatment doctrine does not toll the statute of limitations until treatment is complete if "the claimant is aware of the acts constituting negligence." Reilly, 513 F.2d at 150. In this case, the district court determined that McCoy knew of his doctors' breach of duty "as soon as the leg was amputated." We cannot say that this determination is clearly erroneous. See Walker, 175 F.3d at 438. Therefore, as in Reilly, "[t]he fact that the appellant continued to receive treatment for her condition well into the two-year period prior to the filing of [his] administrative claim does not change the result here." Id.

III

Because McCoy is unable to toll the limitations period, his untimely claim did not effectuate a waiver of the government's sovereign immunity. For this reason, we affirm the decision of the district court.

McMILLIAN, Circuit Judge, dissenting.

I respectfully dissent. I think that there are two versions of the continuing treatment doctrine, one which postpones the accrual of the cause of action and a second which tolls the running of the statute of limitations. Because the district court concluded—mistakenly, in my view, as I explain below—that McCoy did not raise

a claim of continuing negligence, the following discussion is necessarily speculative.

TWO VERSIONS

First, continuing treatment may postpone the accrual of a cause of action. Ordinarily, "[a]n FTCA action accrues when the plaintiff in the exercise of reasonable diligence knows both the existence and the cause of his [or her] injury." Ulrich v. United States, 853 F.2d 1078, (2d Cir. 1988) citing United States v. Kubrick, 444 U.S. 111, 122–25 (1979) (rejecting argument that FTCA claim does not accrue until plaintiff knows that acts inflicting injury may constitute negligence). However, as noted by the majority opinion, "[u]nder the continuing treatment doctrine, a plaintiff's cause of action does not accrue until the tortious continuing treatment ends, even if the plaintiff is aware of the facts constituting negligence before that time." Slip op. at 5, citing Wehrman v. United States, 830 F.2d 1480, 1483 (8th Cir. 1987). "Since usually no single incident in a continuous chain of tortious activity can 'fairly or realistically be identified as the cause of significant harm,' it seems proper to regard the cumulative effect of the conduct as actionable." Page v. United States, 729 F.2d 818, 821–22 (D.C. Cir. 1984), citing Fowkes v. Pennsylvania R.R., 264 F.2d 397, 399 (3d Cir. 1959). As noted by the majority opinion, this circuit has rejected the argument that Kubrick overruled the continuing treatment doctrine, slip op. at 5, citing Wehrman, 830 F.2d at 1486, and has held that "where the tortious conduct is of a continuing nature, the Kubrick rule does not apply." Id., citing Gross v. United States, 676 F.2d 295, 300 (8th Cir. 1982).

Second, continuing treatment may toll the running of the statute of limitations. "[W]here the plaintiff is in the continuing care of the negligent actor for the same injury out of which the FTCA cause of action arose, the statute of limitations may be tolled under certain circumstances until the end of the course of treatment." Ulrich, 853 F.2d at 1080 (explaining two rationales that support the continuing treatment doctrine are, first, that it is not reasonable to expect a patient who is in the continuing care of a doctor to discover that the

doctor's acts may be the cause of his or her injury and, second, that it is not reasonable to expect a patient being treated by a doctor or hospital to interrupt corrective treatment by instituting suit against either while under their continuing care).

Here, McCoy argued that his claim was not based on a single incident of negligent conduct. Rather, as noted by the majority opinion, he argued that the entire course of diagnosis and treatment of his peripheral vascular disease, or Buerger's disease, including the amputation and post-amputation treatment, was negligent. Slip op. at 4.

ADMINISTRATIVE CLAIM

The majority opinion concluded that McCoy did not raise an issue of continuing negligent treatment in his administrative claim and therefore could not rely on the continuing treatment doctrine later in court. Id. at 5 (FTCA litigant must raise claim first in administrative claim). I disagree. "A valid claim need do no more than provide sufficient information as to allow an agency to process a claim administratively." Dundon v. United States, 559 F. Supp. 469, 477 (E.D.N.Y. 1983). My reading of the record does not support the district court's determination that the administrative claim did not include a claim for continuing negligent treatment, that is, for failure to properly diagnose and treat the underlying peripheral vascular disease.

The administrative claim and the complaint do not refer to "Buerger's disease" by name; however, Buerger's disease is one type of peripheral vascular disease, see Brief for Appellant at 3 n.4 (citations omitted) (noting that Buerger's disease accounts for approximately 5% of all cases of peripheral vascular disease), and each document refers many times to "peripheral vascular disease." The administrative claim alleged that government doctors and others negligently failed to appreciate the seriousness of McCoy's left heel injury and to treat it in a timely and adequate fashion, failed to treat his pre-existing peripheral vascular disease, failed to timely order certain tests which would have revealed the presence of sig-

nificant peripheral vascular disease, failed to read or appreciate the significance of his medical history (which included pre-existing peripheral vascular disease and the amputation of his right leg in 1995), and failed to refer him to a vascular disease specialist in a timely manner. See Joint Designated Record at 55 (item 8 in attachment to administrative claim setting forth basis for claim). Although only the complaint expressly alleged continuing negligence, the administrative claim was sufficiently clear to put the government on notice that the claim was based on a continuous course of treatment rather than a single incident. The language of the Federal Bureau of Prisons regional counsel's letter denying the administrative claim supports this conclusion. See id. at 57 (referring to administrative claim as one that prison staff provided "substandard medical treatment resulting in the amputation"); Dundon v. United States, 559 F. Supp. at 477 (rejecting government's argument that administrative claim, which was largely directed at alleged negligence in diagnosis and failure to treat but which also explicitly referred to an operation, alleged merely negligence in misdiagnosis and did not include malpractice in surgery).

The complaint essentially repeated those allegations. The complaint alleged that government doctors and others were "negligent in the care and treatment of [McCoy] beginning on or about June 25, 199[6, when he reported his left heel injury to prison medical personnel,] and continuing thereafter until [he] was released from federal confinement in April of 1999," in failing to make an accurate and complete diagnosis of his condition, failing to appreciate the seriousness of his left heel lesion and to treat it in a timely and adequate fashion, failing to treat his pre-existing peripheral vascular disease, failing to timely order certain tests which would have revealed the presence of significant peripheral vascular disease, failing to refer him to a vascular specialist in a timely manner, failing to prescribe adequate and proper medications, and failing to advise him concerning the hazards of tobacco use and its debilitating effects on his pre-existing peripheral vascular disease. See id. at 2–3 (paragraph 8 of the complaint). The final point—advise to stop smoking—is significant because abstinence from all tobacco use is apparently the only known method of arresting Buerger's disease. See Brief for Appellant at 3 n.4 (citation omitted).

Thus, because I would hold that the issue of continuing treatment was raised in both the administrative claim and the complaint, I would apply the continuing treatment doctrine to determine when the cause of action accrued.

One could argue that McCoy's cause of action did not accrue until the end of treatment in April 1999, when he was released from federal custody, well after his administrative claim was filed on February 1, 1999. However, "[i]n medical malpractice actions in which the alleged negligence consists of failure to take action, not an affirmative negligent act, factors other than the time of the end of treatment have been considered relevant. One is the deterioration of the plaintiff's condition." Wehrman, 830 F.2d at 1484, citing Raddatz v. United States, 750 F.2d 791, 796 (9th Cir. 1984) (noting that a claim based on failure to diagnose, warn or treat a pre-existing injury accrues when patient becomes aware or through reasonable diligence should have become aware of development of pre-existing condition into more serious condition). Another factor is the gravity of the plaintiff's injury. Id., citing Sanders v. United States, 551 F.2d 458, 460 (D.C. Cir. 1977) (per curiam) (noting that when facts become so grave as to alert a reasonable person that there may have been negligence related to the treatment received, statute of limitations begins to run); see United States v. Reilly, 513 F.2d 147, 150 (8th Cir. 1975) (noting plaintiff's inability to speak was extreme and unexpected consequence of treatment sufficient to put her on notice that she may have been legally wronged).

It was not necessary in Wehrman to decide whether to adopt either factor to limit the scope of the continuing treatment doctrine. See id. However, under either the deterioration of the plaintiff's condition factor or the gravity of the plaintiff's injury factor, McCoy's cause of action accrued before the end of treatment.

As noted by the majority opinion, the district court found that "McCoy knew of his doctors' breach of duty as soon as the leg was amputated [on January 23, 1997]." Slip op. at 4, 6. The district court used pre-Kubrick terminology by referring to "breach of duty." See e.g., Osborn v. United States, 918 F.2d 724, 731 (8th Cir.

1990) (noting that, post-Kubrick, question is when the plaintiff actually knew or in exercise of reasonable diligence should have known cause and existence of injury). However, given the dramatic and undisputed facts in the present case, the deterioration of his pre-existing condition and the gravity of the injury were sufficient to make McCoy aware of the existence and cause of his injury. McCoy does not dispute the severity and deterioration of his condition. McCoy was also unfortunately all too aware of the danger posed by infection in light of his pre-existing peripheral vascular disease, even though he did not know he had Buerger's disease specifically, due to the infection and subsequent amputation of his right leg in 1995. This is not a case in which his doctors had assured him that his worsening condition was a normal consequence of a medical procedure, see Raddatz, 750 F.2d at 796, or the natural progression of his condition. See Tyminski v. United States, 481 F.2d 257, 260 (3d Cir. 1973). Nor did his doctors repeatedly advise him against a corrective procedure. See Wehrman, 830 F.2d at 1484. For this reason, I would apply the continuous treatment doctrine and hold that his FTCA cause of action accrued, before the end of treatment, on January 23, 1997, the date of the amputation.

TOLLING RUNNING OF STATUTE OF LIMITATIONS

Next, I would apply the continuing treatment doctrine to toll the running of the statute of limitations as follows. Under the continuing treatment doctrine, the statute of limitations period is not tolled by "merely intermittent" medical services, see Page v. United States, 729 F.2d 818, 823 n.36 (D.C. Cir. 1984), or by the mere fact that the plaintiff "continued to receive treatment at facilities owned and operated by the government and was continuously treated by government physicians . . . where a patient receives improper care from one government physician and is thereafter treated by others not accused of that malpractice." Dundon, 559 F. Supp. at 473. Here, McCoy has not alleged "merely intermittent" medical services. He was treated repeatedly by government doctors and others, from June 1996 until early January 1997, at several different medical facilities, both government and non-government. He also received extensive treatment after the amputation from government

doctors first at the federal prison medical center in Springfield, Missouri (until December 1997), then at the federal prison in Allenwood, Pennsylvania (until March 1998), and then again in Springfield (until he was transferred to state custody in April 1999).

This court has rejected the argument that the continuous treatment doctrine requires a relationship with a single physician. See Wehrman, 830 F.2d at 1484-85 (holding statute of limitations period could be tolled by continuing treatment doctrine where plaintiff was treated by many different VA doctors at the same VA facility on same plan of treatment over 22 years). This is not a case in which the plaintiff alleged that he received improper care from government doctors in different government hospitals but was thereafter treated by others not accused of that malpractice. See Ulrich, 853 F.2d at 1081 (holding statute of limitations period was tolled by continuing treatment doctrine where plaintiff was treated properly by doctors in one division in order to correct negligence of different doctors in another division of same hospital); Dundron, 559 F. Supp. at 473 (holding statute of limitations period not tolled by continuing treatment doctrine where the plaintiff was treated by different VA doctors in different VA hospitals but did not allege treatment after November 1975 by any of the doctors claimed to be responsible for misdiagnosis in August 1975). Cf. Otto v. National Institutes of Health, 815 F.2d 985, 988-89 (4th Cir. 1987) (holding continuing treatment doctrine applied even though plaintiff was treated by private doctors between transplant surgeries by government doctors because such treatment was rendered at advice and under the direction of government doctors, to whom private doctors consistently and repeatedly deferred). Rather, McCoy alleged that the entire course of diagnosis and treatment of his Buerger's disease, by different government doctors and others at different government and other medical facilities, including the amputation and post-amputation treatment, was negligent.

Thus, although McCoy's cause of action accrued on January 23, 1997, his continuing treatment at the federal prison medical center in Springfield tolled the running of the statute of limitations until at least December 16, 1997, when he was transferred to the federal prison in Allenwood. Since he filed his administrative claim in

February 1, 1999, within 2 years of December 16, 1997, his administrative claim was timely filed.

Assuming that our circuit requires that any corrective treatment must be negligent, see slip op. at 5-6, that factor has been met in the present case because, as noted above, McCoy alleged that the entire course of diagnosis and treatment of his peripheral vascular disease, or Buerger's disease, including the amputation and post-amputation treatment was negligent. For that reason, it is irrelevant whether McCoy's claim also alleged negligence with respect to the amputation and post-amputation treatment. It is enough for statute of limitations analysis that he alleged negligence in the corrective treatment he received after the amputation, which included the treatment of his peripheral vascular disease. See Brief for Appellant at 9, 14-17 (alleging negligence in failure to properly diagnose and treat peripheral vascular disease, specifically identified as Buerger's disease, including failure to advise him to stop smoking, which resulted in amputation and several post-amputation surgeries); Reply Brief for Appellant at 2 (referring to cause of action as based on the failure to properly diagnose and treat peripheral vascular disease, "described by the government's doctors as Buerger's Disease," which resulted in amputation and other serious medical consequences, and noting that "[w]hether the amputation procedure itself was negligent is another question not currently at issue").

REILLY v. UNITED STATES

Finally, as noted by the majority opinion, slip op. at 6, Reilly v. United States held that "[t]he fact that the appellant continued to receive treatment for her condition well into the two-year period prior to the filing of her administrative claim does not change the result here (referring to accrual of cause of action more than two years earlier)." 513 F.2d at 150 (footnote omitted) (holding that extreme and unexpected consequence, including inability to speak from April to August 1969, was sufficient to put plaintiff on notice that she may have been legally wronged so that cause of action accrued in August 1969, even though she continued to receive treatment for condition well into two-year period prior to filing admin-

istrative claim) (pre-Kubrick case). Although this statement would appear to preclude application of the continuing treatment doctrine to toll the running of the statute of limitations, I am convinced that a close reading of Reilly and the case upon which Reilly relies for that proposition, Tyminski, 481 F.2d at 265 n.5, cited in Reilly, 513 F.2d at 150, indicates that those cases involved application of the continuing treatment doctrine to the accrual of the cause of action and not the tolling of the running of the statute of limitations. For that reason, I do not read Reilly to preclude application of the continuing treatment doctrine to toll the running of the statute of limitations.

In Reilly the alleged malpractice occurred on November 18, 1968, when the plaintiff experienced a severe asthma attack and was placed on a respirator. Within days of being removed from the respirator, she complained to her doctor that her throat was sore and hoarse, and the doctor assured her that the condition was a normal aftereffect of use of the respirator. However, the respirator caused an unusual amount of scar tissue to form on the plaintiff's trachea, a condition known as tracheal stenosis. In April 1969 she underwent tracheal dilation treatment, which did not cure the tracheal stenosis, and she was unable to speak from April to August 1969. She filed her administrative claim on December 29, 1971, claiming that the use of the respirator constituted medical malpractice. The district court found that her cause of action accrued in August 1969, more than two years prior to the filing of the administrative claim. The district court found that the plaintiff knew of the casual relationship between the tracheal stenosis and the use of respirator in January 1969, when her doctors informed her that tracheal stenosis was a rare aftereffect of the use of the respirator. 513 F.2d at 149. The district court also noted that the plaintiff could rely on the statements of her doctors that tracheal stenosis was a normal occurrence of the treatment she had received or her faith in their efforts to cure it. Id. at 150. However, the district court decided that, by August 1969, her condition had become so grave—she was unable to speak—that her cause of action accrued at that time, despite the assurances of her doctors. Id. (Reilly was decided before Kubrick and so its analysis refers to accrual of the cause of action when the plaintiff knew that she may have been "legally wronged"). This

court affirmed and rejected the plaintiff's argument that the statute of limitations had not run because she had received treatment for her condition well into the two-year period prior to the filing of her administrative claim. This court noted "the [continuing treatment] rule does not apply when the claimant is aware of the acts constituting negligence." Id., citing Tyminski, 481 F.2d at 265 n.5. Even though the language refers to the running of the statute of limitations, the analysis actually refers to the accrual of the cause of action, id., citing Tyminski, 481 F.2d at 264 n.5 (noting that "when a person knows of the acts constituting negligence . . ., little, if any, investigation is necessary to determine whether a meritorious cause of action exists"), and, as discussed below, that is precisely the context in which the continuing treatment doctrine is discussed in Tyminski, the case cited by Reilly.

In Tyminski, which, like Reilly, is a pre-Kubrick case, the plaintiff had been injured by shrapnel during World War II. He had progressive difficulty walking and increased pain and, after tests, was diagnosed as having an arteriovenus angioma (AVA), a type of lesion on the spinal cord. An operation was performed on July 17, 1957. Within days of the operation, the plaintiff began to lose control of his lower extremities and developed paraplegia. He was persistently informed by his doctors that the paraplegia was due to the natural progression of his AVA. However, the district court found that the paraplegia was caused by post-operative bleeding and that the defendants were negligent in failing to diagnose the cause of the paralysis and to operate to stop the bleeding. The plaintiff was discharged from the hospital in December 1959 and was readmitted to the hospital many times for treatment for the paraplegia, including multiple surgeris, until his death in June 1969. In the meantime, the plaintiff had repeatedly (and desperately) sought additional veterans' benefits, and, in June 1964, one of the grounds included a reference to the 1957 operation as a cause of the paralysis. The district court rejected the government's argument that the cause of action accrued at the latest by June 1964 and, therefore, the suit filed in January 1967 was untimely filed.

The court of appeals affirmed and held that the district court did not clearly err in finding that the claim had not accrued more than

two years before the filing of the complaint. 481 F.2d at 264. The court first agreed that the record amply supported the conclusion that the plaintiff did not discover the acts constituting malpractice more than two years before the action was filed. Id. The court next decided that the plaintiff in the exercise of reasonable diligence should not have discovered the acts constituting negligence, noting that he had very little reason to doubt that his injuries were caused by the natural progression of the AVA, his doctors had told him that paralysis could have occurred at any time because of the possibility of thrombosis, he had received continuous medical treatment from June 1957 to at least 1962, and he had made repeated efforts to ascertain some medical basis for increasing his disability payments over the years. Id. at 264-65. With respect to the continuous medical treatment, the court noted that

> [r]easonable diligence does not require that a person who does not know of the acts constituting malpractice and who has little reason to doubt that his [or her] injury resulted from the natural progression of a pre-operative disorder interrupt the care he [or she] is receiving to cure his [or her] injuries in order to ascertain whether the persons providing care negligently caused his [or her] injuries.

Id. at 264 (footnote omitted).

In the footnote cited in Reilly, the continuing treatment doctrine is discussed in the contect of the accrual of the cause of action. The plaintiff had argued on appeal that continuous treatment should act as an alternative test for determining when a claim accrues under the FTCA. The court rejected that argument, finding

> no value in the contention that a person who knows of the existence of the acts upon which his [or her] claim for negligence in a medical malpractice case is based may nevertheless forestall bringing suit until the treatment for his [or her] injuries is complete. The rationale for the continuous treatment rule as expressed by the New York Court of Appeals in Borgia v. City of New York, 12 N.Y.2d

151, 237 N.Y.S.2d 319, 187 N.E.2d 777 (1962), does, however, have value in determining reasonable diligence to discover the acts constituting negligence. For this reason we do not reject the rule completely as did the Ninth Circuit in Ashley v. United States, 413 F.2d 490 (9th Cir. 1969). The Ashley court viewed the rule's rationale as only applicable, if at all, to situations in which physicians conspire to conceal their negligence from the patient. Concealment, however, is not the rationale for the rule expressed in Borgia v. City of New York, supra, and Kossick v. United States, 330 F.2d 933, 936 (2d Cir.), cert. denied, 379 U.S. 837 (1964). Rather, the rule is premised on the notion that a person should not be required to investigate the cause of this injuries or to bring suit while receiving necessary treatment for the injuries. The interest in preventing stale claims convinces us that this rationale for the rule has no merit when a person knows of the acts constituting negligence. In this situation little, if any, investigation is necessary to determine whether a meritorious cause of action exists. A different situation is posed, however, when a person does not know of the acts constituting negligence. Under these circumstances the rationale for the continuous treatment test has value in determining the exercise of reasonable diligence to discover the acts constituting negligence. In the case sub judice there exist factors in addition to continuous treatment which necessarily enter into a determination of reasonable diligence.

Id. n.5 (underscoring text cited in Reilly).

Thus, even though the language used in Reilly to reject applying the continuing treatment doctrine refers to the tolling of the running of the statute of limitations, the analysis actually refers to the accrual of the cause of action because that is the context in which the continuing treatment doctrine is discussed in both Reilly and in

Tyminski the case upon which it relies.

In my opinion, I would hold that McCoy's claim was timely filed because McCoy did raise an issue of continuing negligent treatment in his administrative claim and therefore could raise the continuing treatment doctrine in court; the continuing treatment doctrine postponed the accrual of his cause of action until January 23, 1997, the date of the amputation, at which time his pre-existing condition had so deteriorated and become so grave that he had to have been aware of the existence and probably cause of his injury; and the continuing treatment doctrine tolled the running of the statute of limitations until some point after February 1, 1997, two years before he filed his administrative claim, because he continued to receive allegedly negligent treatment for his underlying peripheral vascular disease, including the amputation and post-amputation treatment, until December 1997, when he was transferred from the federal prison medical center to Allenwood.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 00-1375

STEVEN McCOY,	*	
	*	
Appellant,	*	
	*	Order Denying Petition
v.	*	for Rehearing and for
	*	Rehearing En Banc
UNITED STATES OF AMERICA,	*	
	*	
Appellee.	*	

The petition for rehearing en banc is denied. Judge McMillian, Judge Murphy and Judge Bye would grant the petition.

The petition for rehearing by the panel is also denied. (5128-010199)

October 31, 2001

Order Entered at the Direction of the Court:

Clerk, U.S. Court of Appeals, Eighth Circuit

Supreme Court, U.S.
FILED
APR 12 2002
CLERK

(2)

No. 01-1157

In the Supreme Court of the United States

STEVEN MCCOY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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1348

QUESTION PRESENTED

Whether a medical malpractice action brought under the Federal Tort Claims Act is barred when the administrative claim for damages resulting from amputation of a limb was filed more than two years after the date of the amputation.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	5
Conclusion	10

TABLE OF AUTHORITIES

Cases:

Branti v. *Finkel*, 445 U.S. 507 (1980)	6
Deloria v. *Veterans Admin.*, 927 F.2d 1009 (7th Cir. 1991)	5
Graver Tank & Mfg. Co. v. *Linde Air Prods. Co.*, 336 U.S. 271 (1949)	6
Kerstetter v. *United States*, 57 F.3d 362 (4th Cir. 1995)	7
Otto v. *NIH*, 815 F.2d 985 (4th Cir. 1987)	6, 7, 9
Provancial v. *United States*, 454 F.2d 72 (8th Cir. 1972)	5
Tiffany Fine Arts, Inc. v. *United States*, 469 U.S. 310 (1985)	6
Ulrich v. *Veterans Admin. Hosp.*, 853 F.2d 1078 (2d Cir. 1988)	6, 8, 9
United States v. *Kubrick*, 444 U.S. 111 (1979)	6
Wehrman v. *United States*, 830 F.2d 1480 (8th Cir. 1987)	6, 9

Statutes:

28 U.S.C. 2401(b)	3
28 U.S.C. 2675	5

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 15-32) is reported at 264 F.3d 792. The opinion of the district court (Pet. App. 12-14) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 31, 2001. A petition for rehearing was denied on October 31, 2001 (Pet. App. 33). The petition for a writ of certiorari was filed on January 22, 2002, and docketed on February 7, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner was convicted of drug conspiracy charges and incarcerated in various federal prisons from 1993 to April 16, 1999. In December 1994, he was bitten on the right leg by a spider and sought treatment at the prison infirmary. Following a worsening of petitioner's condition, doctors eventually diagnosed peripheral vascular disease and attempted an arterial bypass. When this attempt failed, petitioner's right leg was amputated on November 21, 1995, at the Osteopathic Medical Center of Texas. Pet. App. 16.

In June 1996, petitioner noticed lesions on the heel of his left foot. He again sought treatment and was transferred to several different medical facilities, at which he received treatment from several different doctors. A vascular bypass and other attempts to clear the artery failed. He developed gangrene in the left foot, which was amputated on January 23, 1997, by doctors at the United States Medical Center for federal prisoners in Springfield, Missouri. Subsequently, he had additional medical treatment to close the wound caused by this second amputation, to attempt skin grafts, for a stump revision, and for a bone resection. Pet. App. 16.

2. On September 19, 1996, while his left leg was being treated, petitioner filed an administrative claim seeking damages for the amputation of his right leg. R. 34. He claimed that if proper first aid had been administered, the condition could have been arrested without the subsequent loss of the right leg. *Ibid.* The administrative complaint was denied on January 16, 1997. R. 35-36.

3. On July 17, 1997, petitioner filed a lawsuit in the United States District Court for the Eastern District of

Pennsylvania. He sought damages for the amputation of both his right and left legs, and further alleged that he suffered damages "by the inexcusable delays of starting to treat him, and before and between each amputation." R. 69-70. The case was dismissed in November 1998. Pet. App. 3.

4. On February 1, 1999, petitioner filed a new administrative claim with the Bureau of Prisons. Pet. App. 17. In this second claim, he sought damages for the amputation of his left leg and "pain and suffering as a result of that amputation and prior thereto as a result of the failure of physicians and others to adequately treat his left foot wound." *Id.* at 2. The claim was denied on February 11, 1999 (R. 57), on the ground that it had not been filed within two years after the accrual of the injury as required by 28 U.S.C. 2401(b).

5. Petitioner then brought this action, based on the February 1, 1999, administrative claim, in the United States District Court for the Western District of Missouri. Pet. App. 17. The government moved for summary judgment on the basis of petitioner's failure to file his administrative claim within two years after his left leg had been amputated. *Id.* at 12, 17. In response, petitioner argued that the "continuing treatment" doctrine tolled the limitations period. *Id.* at 17. The district court ultimately entered summary judgment in favor of the United States, finding that petitioner's argument of ongoing treatment was irrelevant to the allegations made in his administrative claim. *Id.* at 13-14, 17.

The court of appeals affirmed. Pet. App. 20. The court agreed with the district court's determination that petitioner "knew of his doctors' breach of duty 'as soon as the leg was amputated'" in January 1997, so that the two-year statute of limitations had run before

the filing of petitioner's February 1999 administrative complaint. *Id.* at 19. Moreover, the court also concluded that the statute of limitations had not been tolled by the continuing treatment doctrine because "the date his leg was amputated was a date certain, and because there could be no continuing 'treatment' to correct the error resulting in the loss of his leg, he was therefore required to file his administrative claim within two years of the amputation." *Id.* at 18-19. It further concluded that the administrative claim failed, in any case, to encompass an allegation of continuing negligent treatment, *id.* at 19 & n.3 (district court's finding that petitioner's "administrative claim cannot be fairly read to encompass his failure to diagnose and treat claim" not clearly erroneous), a requirement for successfully later invoking the continuing treatment doctrine in court. *Ibid.*; see *id.* at 22 (McMillian, J., dissenting) ("The majority opinion concluded that [petitioner] did not raise an issue of continuing negligent treatment in his administrative claim and therefore could not rely on the continuing treatment doctrine later in court.").

The dissent noted that the majority's opinion rested on the factual finding made by the district court that the administrative claim did not include an allegation of continuing treatment or continuing negligence. See Pet. App. 22. Judge McMillian disagreed with these factual conclusions and so went on to address the application of the continuing treatment doctrine. Judge McMillian argued that, even "[a]ssuming that our circuit requires that any corrective treatment must be negligent, that factor has been met in the present case because, as noted above, [petitioner] alleged that the entire course of diagnosis and treatment of his peripheral vascular disease, or Buerger's disease, in-

cluding the amputation and post-amputation treatment[,] was negligent." *Id.* at 27.

ARGUMENT

Petitioner contends (Pet. 16) that the Court should grant certiorari to resolve a conflict among the circuits over the prerequisites to proper invocation of the "continuing treatment doctrine." This case represents an inapt vehicle for resolving any conflict for three reasons. First, the court of appeals made clear that its decision was justified on an independent, fact-specific ground. Second, on the facts of this case, petitioner would lose under any standard articulated in the courts of appeals. Third, it is unclear, in any event, that a ripe circuit conflict even exists.

1. Although petitioner had additional medical procedures performed after the January 23, 1997, amputation of his left leg, his administrative claim specifically requested damages for the loss of that leg and the "pain and suffering as a result of that amputation *and prior thereto*." Pet. App. 2 (emphasis added). Section 2675 of Title 28 requires a litigant to state all of his claims in his administrative claim. See, *e.g.*, *Deloria* v. *Veterans Admin.*, 927 F.2d 1009, 1011 (7th Cir. 1991); *Provancial* v. *United States*, 454 F.2d 72, 74-75 (8th Cir. 1972). Thus, while petitioner later argued in his district court complaint that negligent treatment of his vascular disease *after* the date of this amputation was part of his case, the district court and court of appeals properly disregarded these allegations because it found that these allegations of continuing negligent treatment had not been included in petitioner's administrative claim. Pet. App. 13, 19.

The finding by both courts below that the claim alleged an injury based only on treatment up to the left-

leg amputation is factual in nature and, absent extraordinary circumstances, therefore will not be disturbed by this Court. See, *e.g.*, *Tiffany Fine Arts, Inc.* v. *United States*, 469 U.S. 310, 317-318 n.5 (1985); *Branti* v. *Finkel*, 445 U.S. 507, 512 n.6 (1980); *Graver Tank & Mfg. Co.* v. *Linde Air Prods. Co.*, 336 U.S. 271, 275 (1949). This finding independently supports the court of appeals' disposition of this case. Accordingly, the decision below is correct and does not implicate the alleged circuit conflict to which the court's alternative holding alludes.

2. An FTCA claim for medical malpractice accrues when the plaintiff becomes aware of the existence of his injury and discovers, or in reasonable diligence should have discovered, the acts constituting the cause of his injury, even though he is unaware that he may have received substandard care. *United States* v. *Kubrick*, 444 U.S. 111, 120-122 (1979). A gloss on the general *Kubrick* rule—the so-called continuing treatment doctrine—has been articulated by some courts of appeals. Under this doctrine, the two-year limitations period is tolled, *under certain circumstances*, during the period when plaintiff remains in the "continuing care of the negligent actor for the same injury out of which the FTCA cause of action arose." *Ulrich* v. *Veterans Admin. Hosp.*, 853 F.2d 1078, 1080 (2d Cir. 1988) (citing *Wehrman* v. *United States*, 830 F.2d 1480, 1485-1486 (8th Cir. 1987); *Otto* v. *NIH*, 815 F.2d 985, 988 (4th Cir. 1987)). The courts of appeals have, in several cases, analyzed whether particular factual circumstances present a proper context for application of the doctrine. Whether tolling is appropriate is a fact-specific inquiry determined on a case-by-case basis. See, *e.g.*, *id.* at 1080-1081.

Essentially, petitioner's claim in this case is that, despite his failure to allege in his administrative claim an injury based on post-amputation medical treatment, the courts below erred in determining that post-amputation treatment did not implicate the continuing treatment doctrine. In particular, petitioner contends (Pet. 16, 20) that the court of appeals' decision not to apply the continuing treatment doctrine in this case conflicts with the Second and Fourth Circuits' decisions in *Ulrich* and *Otto*. That contention is incorrect.

First, despite petitioner's contrary allegation (Pet. 16-17, 20), the Eighth Circuit's rule—that the continuing treatment doctrine does not apply to a claim made by a patient who fails to allege that some part of his continuing treatment was negligent—is not clearly in conflict with the Fourth Circuit's decision in *Otto* v. *NIH*, 815 F.2d 985 (1987).[1] The Fourth Circuit has subsequently indicated that *Otto* stands only for the proposition that a patient cannot reasonably be expected to have learned of his "injury" when a physician has assured him that the evident ill effects of a medical procedure will be temporary. See *Kerstetter* v. *United States*, 57 F.3d 362, 366 (4th Cir. 1995). Thus, the *Otto* rule apparently applies only in cases where the post-injury treatment *is* negligent in a particular manner, *i.e.*, where there is specific misconduct wrongfully indicating the temporary nature of the negligent injury. As such, it is consistent with the Eighth Circuit's requirement, challenged here, that the continuing treatment

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[1] The court of appeals did state that its rule was inconsistent with the Second and Fourth Circuit's articulation of the doctrine. Pet. App. 19-20. However, the court of appeals apparently did not consider the Fourth Circuit's subsequent clarification of *Otto* in its *Kerstetter* decision.

must involve some negligence in order for tolling to be appropriate.

Moreover, although it appears that the rule announced in the case below is in some tension with the rule announced by the Second Circuit in *Ulrich*, petitioner is wrong to assert (Pet. 16-18, 20) that any possible conflict between these decisions is implicated here. The outcome of this case would be identical under the Second Circuit's analysis in *Ulrich*.

Ulrich explains that whether tolling is proper is determined on a case-by-case basis by evaluating whether certain factors make it unreasonable to expect plaintiff to file a claim during the period of continuing care. That is, tolling is proper only if it would either be (1) unreasonable "to expect a patient who is in the continuing care of a doctor to discover that the doctor's acts may be the cause of his injuries" or (2) unreasonable to have required the plaintiff "to interrupt [his doctor's] corrective treatment in order to commence legal proceedings." 853 F.2d at 1080, 1081. Utilizing this test, tolling would not have been proper here.

First, it was not unreasonable to expect the plaintiff to have discovered his injury despite the fact that he remained in the care of the same doctor for follow-up treatment after the amputation. The district court found, and the court of appeals agreed, that petitioner in fact discovered his injury immediately. Pet. App. 13, 18. As the *Ulrich* court explained, the "unreasonable expectation of discovery" rationale ceases to be a persuasive reason for tolling where, for example, "the gravity of [the] injury was sufficient to alert [the patient] to the injury and its cause." *Ulrich*, 853 F.2d at 1081. Few injuries are as grave or as obvious as an amputation. Moreover, when, as here, a plaintiff does in fact discover the injury, it is unlikely that this

"reasonable failure to discover" rationale could ever be implicated; *Ulrich* concerned a case where the injury was not actually discovered by the plaintiff.

Second, it would not have been unreasonable to expect petitioner to interrupt his corrective treatment by instituting suit in this case. This rationale for tolling "permits a wronged patient to benefit from his physician's corrective efforts without the disruption of a malpractice action." *Otto*, 815 F.2d at 988. Here, petitioner could not receive corrective treatment for the amputation of his left leg, which was final at the moment it occurred. Furthermore, petitioner had already filed an administrative claim alleging malpractice regarding his right leg, demonstrating his willingness to interrupt any corrective treatment by challenging his health care providers.

Thus, petitioner is wrong to suggest (Pet. 16) that any differences among the courts of appeals' articulations of what constitutes a necessary prerequisite to invocation of the continuing treatment doctrine would be addressed in the context of this case. Under any standard articulated by the courts of appeals, petitioner's claim would not have been subject to tolling.

3. It is unclear, in any event, that the court of appeals' dicta acknowledging a circuit split is a proper reading of the Eighth Circuit's decision in *Wehrman* v. *United States*, *supra*. No circuit, including the Eighth, had previously recognized a conflict between *Wehrman* and any other court of appeals decision. Indeed, *Ulrich* cited *Wehrman*, see *Ulrich*, 853 F.2d at 1080, in support of the standard now being challenged as inconsistent. But even if the conflict were clear, it is brand-new and

has had no practical effect to date.[2] Thus, even if the alleged conflict might ultimately warrant resolution by this Court, the Court would be better served by waiting to see whether the alleged conflict manifests in actual divergent outcomes in factually similar contexts, rather than granting certiorari at this time. Moreover, because cases involving the continuing treatment doctrine arise infrequently, the particular conflict claimed here is unlikely to affect very many, if any, cases in the future.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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APRIL 2002

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[2] The only case where it could have had an effect was in this one, but, as discussed above, see pp. 8-9, *supra*, the outcome in this case was unaffected by the requirement that the continuing treatment had to be negligent.